Supreme Court, U.S.
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No. 98-1061

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

WILLIE CASE,

Petitioner,

v.

OTIS KINSEY, an individual; GARY MONTGOMERY, an individual,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether "self-defense" of property is cognizable as a "good faith" defense based upon constitutional rights in a civil action for interception of wire communication?

II. Whether an expectation of privacy is required to defeat the telephone-extension exemption under Title III of the Omnibus Crime Control and Safe Streets Act of 1968?

III. Whether jurisdiction should have been deferred to the State court proceedings?

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BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Otis Kinsey and Gary Montgomery (hereinafter "Respondents"), brought this action for illegal wiretapping in violation of 18 U.S.C. §2510, et seq. (1994), otherwise know as Title III, the Electronic Surveillance Provisions of the Omnibus Crime Control and Safe Streets Act, against Willie Case (hereinafter "Petitioner") in the United States District Court for the Western District of Oklahoma in 1996. From January of 1995 until March of 1995, Petitioner caused a voice-activated, electronic recording device to be attached and installed upon the telephone wires of Respondents. Petitioner used the recording device to indiscriminately tape at least sixty-six conversations between Respondents and third parties without the consent or knowledge of the parties to the said conversations. Petitioner was not a party to the conversations. Petitioner admitted to recording all conversations made on the telephone. Petitioner admitted disclosing them to third persons.

Title III expressly prohibits the unlawful interceptions of communications. 18 U.S.C. §§2510, et seq. (1994). When a person willfully records a telephone conversation, assuming that no exception to the law is applicable, the person intercepting the communication is subject to civil and criminal liability, including money damages, under Title III. Petitioner admits the intentional interception of the telephone communication.

Title III not only prohibits the interception of a communication, but also proscribes the disclosure of said communications. 18 U.S.C. §§2511(1)(c)-(e) (1994). Petitioner admitted revealing the contents of these recordings to

his lawyer and to other third persons, but contended that this did not constitute disclosure within the meaning of Title III. However, no such exception for disclosure exists under Title III.

Petitioner filed his Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment and Brief in Support on May 15, 1997. Respondents filed their Plaintiffs' Response to Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment on June 2, 1997. On July 8, 1997, the United States District Court for the Western District of Oklahoma filed its Order denying the Defendant's Motions and granting in part and denying in part the Plaintiffs' Motion for Summary Judgment. The United States Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment.

REASONS FOR DENYING THE WRIT

Title III created a cause of action for which Respondents may seek relief in federal court pursuant to 28 U.S.C. §1331 (1980) which states: "The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Petitioner sued Respondents and others in state court. Petitioner's attempted use of the tapes at issue in this case as evidence in the state court case is immaterial to the federal court's jurisdiction. This Court has ruled that the pendency of a similar proceeding in state court does not preclude a federal court from exercising jurisdiction. Colorado River Water Conversation District v. United States, 424 U.S. 800, 814, 96 S.Ct.1236, 1244 (1976). Petitioner has stated no legal authority for his proposition that the federal court should have deferred jurisdiction to the state

court. Further, Petitioner's argument to defer to state court was not properly presented to the Court of Appeals, see Order entered on October 2, 1998 by Tenth Circuit Court of Appeals., and, therefore, not preserved for this Court to rule upon

No expectation of privacy in a communication is necessary in order for Title III to be violated because liability is established upon a showing that a wire communication was intercepted. United State v. Harpel, 493 F.2d 346, 349 (10th Cir. 1974). In the case at bar, as soon as Petitioner first began tape recording Respondents' telephone conversations, Title III had been violated and liability attached. Wire communications, unlike oral communications, are protected against interception by electronic, mechanical, and other devices regardless of the speaker's expectation of privacy. Briggs v. American Air Filter Co., 630 F.2d 414, 417 n.4 (5th Cir. 1980).

This Court has held that "the purpose of the legislation . . . was effectively to prohibit . . . all interceptions of oral and wire communications, except those specifically provided for in the Act . . ." United States v. Giordano, 416 U.S. 505, 514, 94 S.Ct. 1820, 1826 (1974). In the case at bar, Petitioner has failed to show that his actions fall into any exception listed in the statute; consequently, Petitioner is liable for damages under Title III.

Petitioner argues that his disclosure of the tape recordings to attorneys was justified. First, the tape recording itself is a violation even without disclosure. Second, courts that have addressed the issue of disclosure of an intercepted communication to one's attorney have found it to be prohibited within the meaning of the statute. Video Unlimited, Inc. v. Video Shack, Inc., 661 F. Supp 1482, 1488 (N.D. Ill 1987). This Court has stated that "unlawful wiretapping or

eavesdropping, whether deliberate or negligent, can produce nothing usable against the person aggrieved." Alderman v. United States, 394 U.S. 165, 176, 89 S.Ct. 961, 968 (1969).

Petitioner argues that the lower courts failed to recognize self-defense under Title III. In Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991), cert. denied 503 U.S. 951, the court rejected the notion of a motive based or good faith exception. In Heggy, the court held that there is no good faith defense based on a misunderstanding of the law for two primary reasons: 1) a good faith reliance on a mistake of law is not listed among the defenses in 18 U.S.C. §2520(d) (1994); and 2) the law is reluctant to allow testimony concerning a subjective belief after the fact because of an obvious concern with the reliability of such testimony. Id. at 1542. Further, Petitioner failed to set forth any authority for a constitutional challenge to support a self-defense claim.

Respondents dispute Petitioner's claim that he had a vested property interest in his employment. Respondent is an "at-will" employee. Freeman v. Chicago, R.I. & P.R. Co., 239 F. Supp. 661, 662 (W.D. Okla. 1965). Moreover, under Oklahoma law, an "employer may discharge "at-will" employees at any time, with or without cause . . . ." Hays v. City of Pauls Valley, 74 F.3d 1002, 1008 (10th Cir. 1996). The record is void of any facts to establish otherwise. Thus, no statutory or constitutional right exists for a self-defense claim under Title III.

Petitioner cites Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558 (1987), INS v. Chada, 462 U.S. 919, 103 S.Ct. 2764 (1983), and Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112 (1993) for authority that he may violate established federal wire-tapping law to protect his employment. However, none of

these cases discuss the issue for which they are cited. Only Engle is remotely applicable holding that a defense of self defense may not be raised for the first time on appeal. In the case at bar, the lower courts found that self-defense is not recognized under Title III, and is, therefore, not a valid defense.

Petitioner cites Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421 (1978); United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970), cert. denied, 400 U.S. 1000; United States v. Garcia, 42 F.3d 604 (10th Cir. 1994); United States v. Caudill, 43 F.3d 1484 (10th Cir. 1994), to argue that Respondents lack a reasonable expectation of privacy in their telephone conversations. These cases are distinguishable because they do not address Title III. Instead, these cases involve a review of Fourth Amendment rights in relation to criminal convictions. Thus, no inconsistent decisions exist for this Court to review as Petitioner urges.

CONCLUSION

For the reasons given above, this case does not merit further review by this Court. Therefore, the petition should be denied.

Respectfully submitted,

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